Coping with regulation and litigation

With the increasing bite of competition regulation in recent years, including rising levels of fines, many large companies have been accused of price-fixing or abusing their dominant positions in their relevant markets. This means that considerable amounts of time and money are being spent on dealing with lengthy investigations by the European Commission, the UK Office of Fair Trading (OFT) and other regulatory bodies, not to mention battles through the courts, and enforced changes in operations. Damages claims can also be made by customers and other competitors on the back of any infringement decision. The likelihood and magnitude of such claims has increased due to the emergence of specialist law firms targeting potential claimants. Individual directors involved in anti-competitive activities can face disqualification, fines or imprisonment.

Strong position in the market

A company that has a strong position in its market needs to know whether it is at risk of contravening competition law. Companies are often not aware that what they consider to be normal commercial activity, such as having discussions around prices with fellow competitors or through intermediaries, could fall foul of the law.

It is essential, now more than ever, to be aware of the repercussions of one's actions and to be prepared both legally and financially to deal with any investigations or lawsuits that may arise. The European Commission is encouraging more direct actions for damages in local Member State courts for losses caused by infringements of European Competition Law.

Competitor concerns

The rules can also be used by a company to challenge the activities of a competitor or supplier thought to be behaving anti-competitively. Complaints can be made to regulators who can initiate investigations or impose behavioral conditions by way of interim relief. If an infringement is found to have occurred, the decision can be used as evidence to sue for damages.
How we can help

Using our forensic and financial analysis skills, we can assist throughout the time line of a competition matter, from assessing compliance procedures through to gathering relevant data to respond to inquiries, advising on submissions to regulators and assisting with accusations of anti-competitive activity and damages claims. We combine our expertise in this area with wider sector expertise as required.

We can help by:

► Reviewing compliance procedures to check that they are fit for purpose
► Using eDiscovery solutions to examine electronic records, for example, in response to requests from regulators or to search for evidence of anti-competitive activity to assist in leniency applications
► Assessing liability for potential anti-competitive activity and effect on competition through performing cost or margin, price and other economic analysis
► Quantifying potential fines and damages, whether in prosecution or defense of a case
► Providing monitoring and divestiture trustee services when required by the regulator to help ensure the smooth transition to a new business combination
► Acting as expert witness in litigation

Our experience

Chapter 1/Article 101 cases

Data analysis and fine quantification

A manufacturing company successfully appealed a penalty imposed by the OFT for entering into a series of individual arrangements with several retailers, whereby the retail price of its products was linked to that of competing manufacturers. The OFT claims that these agreements had an anti-competitive object and/or an anti-competitive effect on the market. We drafted an expert report, providing an analysis of price increases in the period during and after the arrangements were in place. This was used to support the case that there was no such anti-competitive effect. We also reviewed the penalty calculation prepared by the OFT, recalculating it based on alternative definitions of relevant turnover. We used our forensic data analytics team to analyze the large volume of data extracted from the company’s systems.

Support in application for leniency

We assisted the collection of data for a company that was making a leniency application to the OFT as a result of suspected anti-competitive activity by some of its employees. We collected email server data and processed and hosted that information to facilitate review by the company. Duplicates were removed from the data and key words were set to reduce the number of documents for review.

Chapter II/Article 102 cases

Analysis of regulator’s decision

We helped a large dairy company in its appeal to the Competition Appeal Tribunal (CAT) against the decision by the OFT not to find its main competitor guilty of abusing its dominant position in the market. We investigated the basis of the OFT’s decision, and assisted our client in formulating its appeal. We helped identify shortcomings in the methodology the OFT had used and information it had relied on in reaching its decision. This focused on the correct analysis of cost and prices within the specified markets. We presented to the CAT at the hearing. The CAT eventually set aside the OFT’s decision, and awarded our client substantial costs.

Excessive pricing

The European Commission alleged that a telephone operating company was abusing its dominant position in the provision of wholesale international inbound roaming services in the UK by charging excessive prices to foreign operators whose customers were using the service when visiting the UK. We produced an expert report on the costs that should be allocated to the service. This was attached to the company’s reply to the Statement of Objections. We later presented the contents of this report at the Commission’s oral hearing in Brussels. The Commission eventually dropped its charges against the company.

Other cases

Competition Commission investigation into local bus services

We assisted a client which was subject to the local bus services investigation by the UK Competition Commission. As part of this investigation, our client was required to fill in a financial questionnaire to submit to the Commission. We assisted with the completion of this questionnaire, including providing valuations of key assets on a modern equivalent asset basis. Our technology and business modeling teams also helped the client extract and compile detailed route information from the company’s systems in order to respond to queries on route profitability and operations.
OFT enquiry into credit card charges
The OFT launched an investigation into the over-limit and late payment charges of six banks and two credit card companies on the basis that these fees should only cover the costs incurred when a customer defaults or exceeds their limit. We reviewed the company’s cost base on a line-by-line basis to determine costs attributable to the relevant activities. We presented our findings in a report which was used in preparing the company’s response to the OFT. Our input was crucial in differentiating between the company’s and the other respondents’ business operations and demonstrated that activities driving the default charges were not the same for all the businesses under review. The OFT eventually ruled that a default charge should only be used to recover certain limited administrative costs, and any charges more than £12 will be presumed unfair. However, our client was allowed to charge more than £12 on the basis that its operations were considered different from other banks.

Review of competition compliance
We were asked to review the effectiveness of an energy company’s competition compliance program, and to report back to management whether it was fit for purpose. We checked whether key staff in at-risk departments were properly trained in competition issues and knew where to turn for help when required. We interviewed the in-house competition lawyer and senior managers in key departments such as pricing, marketing and competitor intelligence. We reviewed current training material and plans to roll out future online training. Our final report raised important issues such as introducing a code of conduct for gathering and using competitor intelligence.

Acting as a divestiture trustee
We were jointly appointed under mandate by the European Commission and a company to act as divestiture trustee. Our role was to assist the company in the divestment of certain assets that were the subject of commitments to the Commission following the company’s takeover of a smaller business. We assembled a team who had experience of working with the Commission, had significant sector knowledge and also experience in managing and executing complex contractual, restructuring and sales processes. We worked with the client and the Commission throughout the period of our trusteeship to find a solution that was suitable for all parties.